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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

DAVID TOURGEMAN, Plaintiff, vs. COLLINS FINANCIAL SERVICES, INC., a corporation; NELSON & KENNARD, a partnership, DELL FINANCIAL SERVICES, L.P., a limited partnership; DFS ACCEPTANCE, a corporation, DFS PRODUCTION, a corporation, AMERICAN INVESTMENT BANK, N.A., a corporation; and DOES 1 through 10, inclusive, Defendants.	CASE NO. 08-CV-1392 JLS NLS **DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION TO COMPEL FURTHER RESPONSE BY COLLINS FINANCIAL SERVICES, INC. AND NELSON & KENNARD TO REQUESTS FOR PRODUCTION AND INTERROGATORIES, AND IN SUPPORT OF DEFENDANTS' CROSS-MOTION FOR PROTECTIVE ORDER** Date: April 5, 2010 Time: 9:30 a.m. Crtrm: 1101 The Honorable Nita L. Stormes

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I. INTRODUCTION

The motion to compel by Plaintiff David Tourgeman ("Tourgeman") seeks sweeping discovery on the theory that this is a big case that puts "all" of Defendants' collection practices at issue. Not so. The scope of this case is actually very narrow. The Court has already ruled that there is only one "communication" at issue here: the state court collection complaint filed against Tourgeman by defendant Nelson & Kennard on behalf of its client, defendant Collins Financial Services ("Collins"). Tourgeman claims that complaint violated the Fair Debt Collection Practices Act ("FDCPA) and state law because it sought to recover a debt he allegedly paid "in full" to Dell, and because the complaint was filed in the wrong judicial district. The complaint is the only communication Tourgeman says he received from Defendants.

Tourgeman's case is not only narrow in scope, but it is also hanging by the narrowest of threads. Defendants filed a summary judgment motion five months ago explaining why his claims fail as a matter of law. The Court granted Tourgeman's Rule 56(f) motion, allowing discovery on a few issues he claimed were necessary for his response. Defendants produced the documents and made their witnesses available for depositions. Instead of taking the depositions and filing his opposition, however, Tourgeman chose to delay. He cancelled the depositions, waited a few months, and then filed this motion, seeking discovery that nothing to do with the summary judgment motion, and nothing to do with the case.

Tourgeman clearly favors a blunt instrument over a scalpel. For example, he has moved to compel on eighteen (18) separate discovery requests that he never bothered to mention to Defendants in any meet and confer. Even after Defendants brought this violation of the Local Rules and Federal Rules to his attention, Tourgeman pressed forward, refusing to withdraw the motion or to withdraw it as to the eighteen requests.

Tourgeman has also moved to compel on numerous requests where Defendants have already produced the documents and information to him, or where they have said in their responses that no such documents exist. He is firing indiscriminately.

The motion suffers from Tourgeman's fundamental misunderstanding of the substantive law governing the FDCPA, and his confusion about what evidence might be considered even remotely relevant to his claims. The FDCPA does not prohibit collectors from having any "contact" with debtors. Nor does it prohibit collectors from "suing" debtors. Tourgeman cannot simply announce that he is pursuing a class action on behalf of every consumer that was "contacted or sued" by Defendants and hope this will justify the breadth of his discovery. He must tie his discovery to some alleged conduct by Defendants that is actually proscribed by the Act. He has not even tried to make this connection. His requests for the number of persons Defendants contacted or sued, and for copies of every collection letter sent and every collection complaint filed by Defendants, will not identify a class.

Similarly, the requests for information about Defendants' procedures for "investigating" debts are improper, because the FDCPA does not impose a duty of investigation. Discovery on procedures for settling debts or dismissing lawsuits is unfounded, because the FDCPA does not prohibit settlements or dismissals. His requests for copies of Defendants' section 1692g letters makes no sense, because that claim was already dismissed by the Court. Tourgeman says he received no letters and is not pursuing a claim based on any letter.

This motion should be denied. It was filed without any attempt to meet and confer as to eighteen of the requests. It seeks documents and information that has already been provided or that does not exist. It seeks information about claims that have been dismissed or that have never been asserted. It seeks information based on the unsupportable assumption that Defendants violated the FDCPA every time they made contact with a debtor or filed a collection lawsuit.

Tourgeman's case is floundering, and this motion is nothing more than a very expensive and time-consuming delay tactic. The Court should find, pursuant to Rule 37(a)(5)(B) of the Federal Rules of Civil Procedure, that Defendants are entitled to recover their attorneys' fees and reasonable expenses in responding to the motion.

At a bare minimum, the Court should issue a protective order for Defendants, permitting Tourgeman to obtain only that discovery he previously identified in his Rule 56(f) motion that has not been produced (if there is any). The Court can then reset the hearing on Defendants' summary judgment motion, which should clear this case from the docket.[1]

II. ARGUMENT

A. The Motion Should Denied In Full, Or At A Minimum, Should Be Denied As To The Eighteen Discovery Requests That Counsel For Tourgeman Never Mentioned During Any Meet And Confer

No party may move for an order compelling further discovery until after the party has made a good faith attempt to meet and confer to resolve the dispute without court intervention. The Federal Rules Of Civil Procedure and Local Rules of this Court are crystal clear on this point. *See* Fed. R. Civ. P. 37(a)(1) ("The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action."); Local Rule 26.1a ("The court will entertain no motion pursuant to Rules 26 through 37, Fed. R. Civ. P., unless counsel will have previously met and conferred on **all disputed issues**.").

Despite these clear requirements, eighteen of the discovery requests that are the subject of this motion were never discussed in any letter or any phone call by counsel for Tourgeman. *See* Declaration of Tomio B. Narita In Support Of Opposition To Motion To Compel And Motion For Protective Order And Award Of Sanctions

[1] Concurrently with this opposition memorandum, Defendants have filed Separate Statements which list each of the discovery requests at issue and which explain in detail why no further response is warranted.

("Narita Decl."), ¶¶ 3-6, Exs. A and B. This was no oversight. In fact, Defendants specifically informed counsel for Tourgeman that the motion was improper because no meet and confer had been conducted, but Tourgeman's counsel refused to take the motion off calendar, and counsel also refused to withdraw the motion as to the eighteen requests. *Id*.

Since no meet and confer was conducted as to "all disputed issues" as required by Rule 26.1a of the Local Rules, the entire motion should be denied. At a bare minimum, the Court should deny the motion as to the eighteen discovery requests that were never discussed by counsel. *See Presidio Components, Inc. v. American Technical Ceramics Corp*., 2009 WL 1423577, *3-4 (S.D. Cal. May 20, 2009) (denying motion to compel where no proper meet and confer conducted in advance of motion). Counsel for Tourgeman should also be sanctioned and ordered to pay Defendants' attorneys' fees given their deliberate refusal to comply with the requirements of the Federal Rules and the Local Rules.

B. Only "Relevant" Evidence Is Properly Discoverable, And The Court May Issue A Protective Order That Limits The Scope Of Discovery Or That Controls The Timing Of Discovery

While the scope of permissible discovery is certainly broad, the Ninth Circuit has recognized is not without limits. *See Epstein v. MCA, Inc*., 54 F.3d 1422, 1423 (9th Cir. 1995) (district court abused discretion in granting motion to compel where information requested was irrelevant as it "would have no bearing on either the merits of the case or the motion for class certification"). Under Rule 26, parties may only obtain discovery if the information requested is "relevant" to a claim or defense in the case. *See* Fed. R. Civ. P. 26(b). In other words, discovery is improper where, as here, the information requested has no bearing on the allegedly unlawful conduct at issue. *See Epstein*, 54 F. 3d at 1423-24; *see also Food Lion, Inc. v. United Food And Commercial Workers Int.'l Union*, 103 F.3d 1007, 1012-13 (D.C. Cir. 1997) (vacating order compelling production of documents; liberal discovery rules are "not so liberal as to allow a party to roam in shadow zones of relevancy and to explore

matter which does not presently appear germane on the theory that it might conceivably become so.") (citations, quotation marks omitted); *Mack v. Great Atlantic and Pacific Tea Co., Inc*., 871 F.2d 179, 187 (1st Cir. 1989) (trial court's limits on scope of discovery were not error where plaintiff's overbroad requests were burdensome immaterial to case; parties "ought not to be permitted to use broadswords where scalpels will suffice, nor to undertake wholly exploratory operations in the vague hope that something helpful will turn up.").

Even if the discovery requested by Plaintiff is permissible, the Court has the power to limit the scope of discovery if "the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues." *See* Fed. R. Civ. P. 26(b)(2)(C)(iii). The Court also has the power to specify that discovery be had only as to certain matters, and it may control the timing and sequence of proper discovery. *Id*. Rule 26 (c)(1), Rule 26(d).

C. The Court Has Already Ruled, And Tourgeman Has Previously Testified, That The Only "Communication" At Issue Is The State Court Collection Complaint Filed Against Tourgeman

In his quest to delay a ruling on the summary judgment motion, Tourgeman ignores the fact that the scope of his claims is actually very narrow. The Court has already ruled that there was only **one** "communication" between Defendants and Tourgeman relating to the debt: namely, the state court summons and collection complaint. *See* Order Granting In Part And Denying In Part Defendant's Motion To Dismiss And Motion To Strike (Docket 58), at 4 (holding that "Defendants' state court claim is a an FDCPA 'communication'"); at 5 (noting that "the conduct at issue – the filing of a state collection action allegedly in violation of the FDCPA – occurred in the United States."). In fact, when it dismissed Tourgeman's claim under section 1692g of the FDCPA, the Court ruled he "**fails to allege any actual**

communications other than the state court summons and complaint." *Id.* at 6 (emphasis added).

Tourgeman subsequently submitted sworn testimony confirming that the state court summons and complaint was the only "communication" he received from Defendants. *See* Declaration of David Tourgeman In Opposition To Defendant's Motion For Summary Judgment (Docket 83-5), ¶ 11.[2]

Tourgeman's remaining claims are that 1) the complaint sought to collect a debt that was paid "in full"; and 2) the complaint was filed in the wrong judicial district. There is no basis for seeking discovery that is not relevant to these claims.

D. Tourgeman Seeks An Order Compelling Documents And Information That Have No Relevance To Any Claim In This Action

1. Discovery Regarding All Debtors Contacted Or Sued By Defendants Is Improper Because It Is Not Unlawful To Contact A Debtor Or To Sue A Debtor

Tourgeman says his requests are proper because he seeks to represent a purported FDCPA class of all persons in the country who were "contacted or sued" by Collins or Nelson & Kennard. It follows, according to Tourgeman, that "all" of Defendants' collection practices are at issue, and all of his discovery is proper. Tourgeman is wrong. The FDCPA does not prohibit collectors from contacting consumers, nor does it bar collectors from filing suits. Rather, the Act prohibits collectors from engaging in a very specific set of unlawful collection practices. *See* 15 U.S.C. §§ 1692b-1692j. Tourgeman has not shown that Defendants have refused him any discovery that is tethered to any allegedly unlawful activity at issue in this case. His motion must fail.

Congress did not pass the FDCPA to prevent collectors from having any contact with debtors, nor to prohibit collectors from filing suit. Rather, as the Ninth

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[2] Although the Second Amended Complaint includes sweeping background allegations drafted by Tourgeman's counsel which vilify the way he imagines the Defendants and other debt collectors operate, Tourgeman never identified any other "communication" made by Defendants, other than the collection complaint.

Circuit has repeatedly recognized, the Act was passed to protect consumers from serious threats, harassment, abuse and other deceptive practices utilized by unscrupulous collectors. *See* 15 U.S.C. § 1692; *Pressley v. Capital Credit and Collection*, 760 F.2d 922, 925 (9th Cir. 1985) (FDCPA passed "to protect consumers from a host of unfair, harassing, and deceptive debt collection practices without imposing unnecessary restrictions on ethical debt collectors") (citation omitted). Nothing in the legislative history of the Act suggests it was meant to operate as a wholesale ban on any type of contact with a debtor, or a prohibition on the ability to file a complaint to collect an unpaid debt. To the contrary, the Ninth Circuit recently observed that the focus of the Act is prevention of deceptive and intimidating conduct by collectors that would seriously "disrupt a debtor's life":

> The purpose of the FDCPA is to protect vulnerable and unsophisticated debtors from abuse, harassment and deceptive collection practices. . . . Congress was concerned with disruptive, threatening, and dishonest tactics. The Senate Report accompanying the Act cites practices such as 'threats of violence, telephone calls at unreasonable hours [and] misrepresentation of consumer's legal rights.' (Citation). **In other words, Congress seems to have contemplated the type of actions that would intimidate unsophisticated individuals and which, in the words of the Seventh Circuit, 'would likely disrupt a debtor's life.'** (Citation).

Guerrero v. RJM Acquisitions LLC, 499 F.3d 926, 938-39 (9th Cir. 2007) (emphasis added).

Tourgeman cannot seek discovery regarding every debtor "contacted or sued" by Defendants unless he identifies how the "contacts" or how the "suits" allegedly violated the FDCPA. He cannot ask the Court to simply assume the Act was violated every time Defendants made contact with a debtor. This would ignore the Ninth Circuit's decision in *Donohue v. Quick Collect, Inc.*, 592 F.3d 1027 (9th Cir. 2010), which held that an allegedly false and misleading statement by a collector does not violate the FDCPA unless it is "material." *Id.* At 1033-34. A "material" misstatement is one that is "genuinely misleading" and that "may frustrate the consumer's ability to intelligently choose his or her response" to the collector's communication. *Id*. at 1034. The Court noted that:

> In assessing FDCPA liability, **we are not concerned with mere technical falsehoods that mislead no one**, but instead with genuinely misleading statements that may frustrate a consumer's ability to intelligently choose his or her response. **Here, the statement in the Complaint did not undermine Donohue's ability to intelligently choose her action concerning her debt.**

Id. at 1034 (emphasis added).[3]

Tourgeman's remaining claims against Defendants are very specific. He alleges Defendants sued him for a debt that was paid "in full" and filed suit in the wrong judicial district. He is entitled to discovery related to those claims. He has not alleged or identified any material misstatement made by Defendants with respect to every debtor that they contacted or sued. His request for documents and information about the total number of debtors Defendants ever contacted or sued is not relevant to his claims, nor will it identify the number of class members.

2. Discovery Regarding Defendants' Procedures For Investigating Debts Is Improper Because The Law Does Not Require A Collector To Investigate A Debt Before It Seeks To Collect It

Many of Tourgeman's requests seek information about the policies or procedures used by Defendants to "investigate" debts before they try to collect them. This discovery is not proper, however, because the FDCPA does not impose a duty on collectors to independently investigate and verify debts before they initiate the collection process.

But Defendants have no business interest in devoting time and energy seeking to collect money from people who do not owe it. For this reason, they do have procedures in place to prevent any attempt to collect debts that have already been paid. Defendants have provided this information to Tourgeman already, and they have offered witnesses for depositions. To the extent he now seeks to compel

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[3] *Donohue* reflects an emerging consensus of circuit courts that rejects highly-technical alleged violations of the FDCPA. *See also Hahn v. Triumph Partnerships LLC*, 557 F.3d 755 (7th Cir. 2009); *Wahl v. Midland Credit Mgmt., Inc*., 556 F.3d 643, 646 (7th Cir. 2009); *Miller v. Javitch, Block & Rathbone*, 561 F.3d 588, 596 (6th Cir. 2009).

documents or responses beyond what has been produced and offered, his motion should be denied.

Contrary to the theory implicit in Tourgeman's discovery requests, the FDCPA does not require a debt collector to independently verify the validity of a debt before attempting to collect it. Instead, the FDCPA allows a collector to assume the debt is valid, unless the debtor submits a timely dispute to the collector. *See* 15 U.S.C. § 1692g(a)(3) (collector must notify consumer that debt will be assumed valid unless consumer disputes validity of debt within 30 days of receipt of notice); *Smith v. Transworld Sys., Inc.*, 953 F.2d 1025, 1032 (6th Cir. 1992) (FDCPA does not require collector to independently investigate debt referred for collection); *Hyman v. Tate*, 362 F.3d 965, 968 (7th Cir. 2004) (FDCPA does not require collector to independently verify validity of debt to qualify for "bona fide error" defense).

The undisputed record shows that non-party Paragon Way, Inc. and Nelson & Kennard both sent notices to Tourgeman as required by the FDCPA, advising him of his right to dispute the debt. But Tourgeman never responded.[4] This is all the FDCPA requires.

If Tourgeman is arguing that discovery about procedures for "investigating" debts is relevant to show that Defendants did not have possession of sufficient evidence to prove their case before the collection suit was filed, his requests are improper as this Court has already rejected this theory of recovery.[5]

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[4] *See* Declaration of Howard Knauer In Support Of Motion For Summary Judgment (Docket 75), ¶ 5, Ex. B; Declaration of Jonathan E. Ayers In Support Of Motion For Summary Judgment (Docket 73), ¶ 4, Ex. B.

[5] *See* Order Granting In Part And Denying In Part Defendant's Motion To Dismiss And Motion To Strike (Docket 58), at 7 ("[T]he filing of a lawsuit, even if a plaintiff does not have the means of proving the case at filing or does not ultimately prevail, has not by itself been considered harassment or abuse under the FDCPA. *See, e.g., Heintz v. Jenkins*, 514 U.S. 291, 296 (1995); *Harvey v. Great Seneca Financial Corp.*, 453 F.3d 324, 330 (6th Cir. 2006).").

Defendants have already provided Tourgeman with discovery on their procedures used to ensure that they are filing suit on valid debts, and to ensure they are filing suit in the correct judicial district. They arranged to have witnesses testify on these topics months ago, but Tourgeman cancelled the depositions. There is no basis for an order compelling a further response.

3. Discovery Regarding Defendants' Collection Letters Is Improper Because The Section 1692g Claim Has Been Dismissed And Tourgeman Does Not Allege He Received Any Letter From Defendants That Violated The FDCPA

The Court previously dismissed the claim that alleged Defendants had not sent Tourgeman a letter containing the notice required under section 1692g of the FDCPA. *See* Order Granting In Part And Denying In Part Defendant's Motion To Dismiss And Motion To Strike (Docket 58), at 6. After that order issued, Tourgeman filed his Second Amended Complaint. That pleading does not allege that Defendants sent him any collection letters, nor does it identify any false or misleading statement allegedly contained in any letter.

Despite this, Tourgeman seeks to compel Defendants to produce copies of all versions of their section 1692g letters, as well as all other collection letters they have utilized. These requests are clearly not related to any claim at issue in this case, and the motion must be denied as to these requests.

4. Discovery Regarding Procedures For Settling Debts Or Dismissing Lawsuits Is Improper Because It Is Not Unlawful To Seek Settlements Or To Dismiss Lawsuits

Tourgeman seeks to compel documents and information about Defendants' policies for settling debts and their policies for dismissing lawsuits. The discovery has nothing to do with this case. Tourgeman does not allege that Defendants violated the FDCPA in connection with settling any debt or dismissing any lawsuit.

Even if the complaint had made this allegation, there is nothing unlawful about settling debts or dismissing lawsuits. To the contrary, cases have repeatedly recognized that the FDCPA encourages settlement of debts. "There is nothing improper about making a settlement offer. (Citation). Forbidding them would force

honest debt collectors seeking a peaceful resolution of the debt to file suit in order to advance efforts to resolve the debt – something that is clearly at odds with the language and purpose of the [Act]." *Campuzano-Burgos v. Midland Credit Management, Inc.*, 550 F.3d 294, 299 (3d Cir. 2008) (citing *Evory v. RJM Acquisitions Funding, LLC*, 505 F.3d 769 (7th Cir. 2007) and *Lewis v. ACB Bus. Servs., Inc.*, 135 F. 3d 389, 399 (6th Cir. 1998).

Similarly, the FDCPA does not prohibit collectors from dismissing collection lawsuits. Under section 581(c) of the California Code of Civil Procedure, any California litigant is permitted to dismiss a lawsuit before trial begins.

The motion must be denied as to requests seeking information relating to Defendants' policies and procedures relating to settling debts and dismissing lawsuits.

E. The Court Should Issue A Protective Order Limiting Tourgeman To The Discovery He Allegedly Needed To Oppose The Pending Summary Judgment Motion

If the Court does not deny this motion outright, Defendants request that it issue a protective order, limiting the scope of discovery at this time to the requests counsel for Tourgeman identified in paragraph 5 of his declaration in support of Plaintiff's motion under Rule 56(f).

Defendants' motion for summary judgment explained why Defendants were entitled to prevail as a matter of law on the "bona fide error" defense. Tourgeman claimed that he could not respond to the motion without certain discovery that he had requested. *See* Declaration of Brett M. Weaver In Support of Plaintiff's Opposition To Motions For Summary Judgment And In Support Of Plaintiff's Rule 56(f) Motion ("Weaver Declaration") (Docket 83-2). The Court granted a continuance, allowing Tourgeman to obtain the discovery identified in paragraph 5 of the Weaver Declaration. *See* Order (Docket 90) at 3.

Defendants believe they have responded to all of the discovery properly, and contend they have produced anything relevant to the pending summary judgment

motion. Instead of taking the depositions of Defendants' witnesses, however, Tourgeman cancelled them at the last minute, waited a few months, and then filed this motion to compel.

Defendants submit that this motion is simply part of a Tourgeman's effort to delay entry of summary judgment against him by seeking to compel discovery on irrelevant topics. At a bare minimum, Defendants ask the Court to enter a protective order, limiting the scope of discovery for now to those items listed in paragraph 5 of the Weaver Declaration. Once that discovery is completed, the summary judgment motion can be reset for hearing. In the event the summary judgment motion is denied, discovery can proceed on any other relevant topic.

III. CONCLUSION

The motion should be denied in its entirety. Tourgeman did not comply with the Local Rules or the Federal Rules when he refused to meet and confer regarding all of the matters covered by the motion. The motion also seeks to compel discovery that has already been produced, that does not exist, that relates to dismissed claims, or that relates to theories that are not unlawful and not at issue. The Court should deny the motion and award costs and fees to Defendants, in a amount to be determined based upon declarations to be submitted by counsel.

In the alternative, the Court should issue a protective order, limiting discovery at this time to the matters identified by Tourgeman in his Rule 56(f) motion until the pending summary judgment motion is resolved.

DATED: March 15, 2010

SIMMONDS & NARITA LLP
TOMIO B. NARITA

By: s/Tomio B. Narita
Tomio B. Narita
Attorneys for Defendants
Collins Financial Services, Inc. and
Nelson & Kennard

PROOF OF SERVICE

I, Tomio B. Narita, hereby certify that:

I am employed in the City and County of San Francisco, California. I am over the age of eighteen years and not a party to this action. My business address is 44 Montgomery Street, Suite 3010, San Francisco, California 94104-4816. I am counsel of record for the defendants in this action.

On March 15, 2010, I caused **DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION TO COMPEL FURTHER RESPONSE BY COLLINS FINANCIAL SERVICES, INC. AND NELSON & KENNARD TO REQUESTS FOR PRODUCTION AND INTERROGATORIES, AND IN SUPPORT OF DEFENDANTS' CROSS-MOTION FOR PROTECTIVE ORDER** to be served upon the parties listed below via the Court's Electronic Filing System:

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I declare under penalty of perjury that the foregoing is true and correct. Executed at San Francisco, California on this 15th day of March, 2010.

By: s/Tomio B. Narita
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